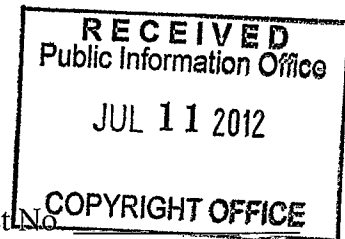


Before the  
COPYRIGHT ROYALTY BOARD  
Washington, DC

\_\_\_\_\_  
In the Matter of )  
 )  
Distribution of DART Sound Recordings )  
Fund Featured Recording Artists and Copyright )  
Owners Subfund Royalties for 2011 )  
\_\_\_\_\_

Docket No.



2012-3028 DD 2011

**NOTICE OF SETTLEMENT AND REQUEST FOR PARTIAL DISTRIBUTION  
OF THE 2011 DART SOUND RECORDINGS FUND FEATURED RECORDING  
ARTISTS AND COPYRIGHT OWNERS SUBFUNDS ROYALTIES**

The Alliance of Artists and Recording Companies (“AARC”), on behalf of itself and Jason Le Sure, the Estate of Leroy Hamilton, and Ingrid R. Taylor (collectively referred to as the “Settling Parties”), submits this notice reporting that the Audio Home Recording Act of 1992 (“AHRA”)<sup>1</sup> 2011 DART Sound Recordings Fund Featured Recording Artists and Copyright Owners Subfunds distribution proceeding is settled, except for the claims of Treasa Fennie aka Write 4 U, Herman Kelly, Eric N. Burns, Marc Alan Suaton, and Pramod Kesav Narayana Pillai (collectively referred to as the “Non-Settling Claimants”). Therefore, the Settling Parties request partial distribution of the 2011 DART Sound Recordings Fund Featured Recording Artists and Copyright Owners Subfunds (“2011 Sound Recordings Fund”).

<sup>1</sup> 17 U.S.C. §§1001-10 (2006).

<sup>2</sup> Although there were initially 9 claimants, authorized representative Kobalt Neighboring Rights, Ltd. withdrew its 2011 DART Sound Recordings Fund Featured Recording Artists Subfund claim for Featured Recording Artist Benny Gallagher on April 12, 2012.

<sup>3</sup> Herman Kelly lists the following aliases on his 2011 DART claims: Herman Kelly And Life, Herman

## **I. Status of Settlement**

AARC pursued and obtained settlements with three of the eight individual claimants for the 2011 Sound Recordings Fund,<sup>2</sup> as detailed below:

### Featured Recording Artists Subfund:

Treasa Fennie aka Write 4 U

Herman Kelly

Ingrid R. Taylor\*\*

### Sound Recording Copyright Owners Subfund:

Jason Le Sure\*\*

Estate of Leroy Hamilton\*\*

Eric N. Burns

Treasa Fennie aka Write 4 U

Marc Alan Suaton

Herman Kelly

Ingrid R. Taylor \*\*

Pramod Kesav Narayana Pillai

\*\*These claimants have signed on with AARC. Therefore, AARC will represent them in the current and all future AHRA Sound Recordings Fund Proceedings.

### **A. Featured Recording Artists Subfund**

Of the three 2011 DART Sound Recordings Fund Featured Recording Artists Subfund ("2011 Featured Recording Artists Subfund") claimants, AARC obtained

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<sup>2</sup> Although there were initially 9 claimants, authorized representative Kobalt Neighboring Rights, Ltd. withdrew its 2011 DART Sound Recordings Fund Featured Recording Artists Subfund claim for Featured Recording Artist Benny Gallagher on April 12, 2012.

settlement with Ingrid R. Taylor. The two remaining 2011 Featured Recording Artists Subfund royalty claimants with whom AARC has been unable to obtain settlement are Treasa Fennie aka Write 4 U (“Write 4 U”) and Herman Kelly,<sup>3</sup> who have de minimis sales totaling 2,517 record sales in a universe of over *one billion* record sales of claimants’ sound recordings sold in 2011. *See* Seltzer Decl. Ex. A, July 10, 2012. Therefore, the Settling Parties respectfully request distribution of 98% of the 2011 Featured Recording Artists Subfund.

### **B. Copyright Owners Subfund**

Of the eight 2011 Dart Sound Recordings Fund Copyright Owners Subfund (“2011 Copyright Owners Subfund”) claimants, AARC obtained settlements with Jason Le Sure, the Estate of Leroy Hamilton and Ingrid R. Taylor. The five remaining 2011 Copyright Owners Subfund royalty claimants with whom AARC has been unable to obtain settlement are the two Non-Settling 2011 Featured Recording Artists Subfund Claimants: Write 4 U and Herman Kelly, in addition to Eric N. Burns, Marc Alan Suaton, and Pramod Kesav Narayana Pillai<sup>4</sup>, all of whom have combined de minimis sales of 2,531 in a universe of over *one billion* record sales of claimants’ sound recordings sold in 2011. *See* Seltzer Decl. Ex. A, July 10, 2012. Therefore, the Settling Parties respectfully request distribution of 98% of the 2011 Copyright Owners Subfund.

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<sup>3</sup> Herman Kelly lists the following aliases on his 2011 DART claims: Herman Kelly And Life, Herman Kelley, and H. Kelly. In an abundance of caution, AARC researched SoundScan record sales data using all of the aforementioned names for Herman Kelly, as well as an alias he filed on previous DART claims, Afterschool Publishing Company.

<sup>4</sup> AARC filed a motion to dismiss Pramod Kesav Narayana Pillai on April 27, 2012. Until the issue is resolved, AARC will continue to include Mr. Pillai in the list of Non-Settling Claimants; however, evidence overwhelmingly suggests Mr. Pillai’s work is not a sound recording but print material.

**II. Given the Settling Parties' significant share of record sales for royalty year 2011, distribution of 98% of the 2011 Sound Recordings Fund is warranted.**

Pursuant to § 801(b)(3)(C) of the Copyright Act, the Copyright Royalty Board ("CRB") has the authority to make a partial distribution of the Sound Recordings Fund, if no claimant entitled to receive such fees has stated a reasonable objection to the partial distribution. Copyright Royalty and Distribution Reform Act of 2004, 17 U.S.C. § 801(b)(3)(C) (2006). Here, the Settling Parties have established that the five remaining individual claimants in the 2011 Sound Recordings Fund are entitled to minimal, if any, royalties based on the distribution, or lack of distribution, of their sound recordings during the 2011 royalty year. Partial distribution, as statutorily permitted under § 801(b)(3)(C), will allow the Settling Parties to collect the royalties to which they are entitled, while allowing the CRB to retain sufficient funds to cover the outstanding claims. *See* § 801(b)(3)(C). Reserving 2% of the 2011 Sound Recordings Fund should be sufficient to resolve any remaining claims of the Non-Settling Claimants.

Pursuant to the AHRA, allocation of the 2011 Sound Recordings Fund royalties must be based on distribution (record sales) of the claimants' sound recordings during the royalty year, in this case, 2011. 17 U.S.C. § 1006(c) (2006); Distribution of the 1992, 1993, and 1994 Musical Works Funds, 62 Fed. Reg. 6,558, 6,561 (Copyright Office Feb. 12, 1997). SoundScan is the industry-recognized source for sound recording sales in the United States and has been recognized in every DART proceeding as credible evidence of distribution for allocation of royalties. Distribution of 1995, 1996, 1997 and 1998 Digital Audio Recording Technology Royalties, 66 Fed. Reg. 9360, 9362 ¶ 61 (Copyright Office Feb. 7, 2001); *see also* Distribution of 1992, 1993 and 1994 Musical Works

Funds, 62 Fed. Reg. at 6,562 (“The [Copyright Arbitration Royalty] Panel’s decision to reject the record sales data submitted by Mr. Curry and rely upon the SoundScan data was not arbitrary.”).

Based on record sales titles figures compiled by SoundScan data, the total record sales for all claimants of the 2011 Featured Recording Artists Subfund is 1,150,306,223 record sales, and the total record sales for all claimants of the 2011 Copyright Owners Subfund is 1,261,449,205 record sales. *See* Seltzer Decl. Ex. A, July 10, 2012. Based on 2011 sales titles and figures compiled by SoundScan, the following record sales exist for the Non-Settling Claimants: 133 record sales for featured recording artist Write 4 U, 133 record sales for copyright owner Write 4 U, 2,384 record sales for featured recording artist Herman Kelly, 2,384 record sales for copyright owner Herman Kelly, and 14 record sales for copyright owner Marc Alan Suaton. *Id.* The 2011 record sales data does not list record sales for any copyright owners named Eric N. Burns or Pramod Kesav Narayana Pillai. *Id.*

Record sales of the Settling Parties’ 2011 Featured Recording Artists Subfund claims total 1,150,303,706 of the 1,150,306,223 universe or 99.9998% of the record sales of the 2011 Featured Recording Artists Subfund claimants. The Non-Settling Featured Recording Artists Claimants’ 2011 record sales of 2,517 amount to less than .000219% of the 1,150,306,223 universe of the 2011 Featured Recording Artists Subfund claimants, which translates to less than \$1.29 for Write 4 U and Herman Kelly combined.

Record sales of the Settling Parties’ 2011 Copyright Owners Subfund claims total 1,261,446,674 of the 1,261,449,205 universe or 99.9998% of the record sales of the 2011 Copyright Owners Subfund claimants. The Non-Settling Copyright Owners Claimants’

2011 record sales of 2,531 amount to less than .0002006% of the 1,261,449,205 universe of the 2011 Copyright Owners Subfund claimants, which translates to less than \$1.77 for Write 4 U, Herman Kelly, Eric N. Burns, Marc Alan Suaton, and Pramod Kesav Narayana Pillai combined.

Given the SoundScan record sales data for the Non-Settling Claimants, the 2% of the 2011 Sound Recordings Fund that would remain after the 98% partial distribution would provide more than sufficient funds to cover any claims by the Non-Settling Claimants. *See* Distribution of 2010 Digital Audio Recording Royalty Funds, Docket No. 2011-6 CRB DD 2010 (Copyright Royalty Bd. Nov. 17, 2011) (Order finding that Non-Settling Claimants Write 4 U Publishing/Treasa Fennie and Herman Kelly were also Non-Settling Claimants in the 2010 DART proceeding and filed comments trying to block the partial distribution. Because their filings did not include reasonable objections, the CRB granted the Settling Parties' 2010 request for partial distribution.); Distribution of 2009 Digital Audio Recording Royalty Funds, Docket No. 2010-5 CRB DD 2009 (Copyright Royalty Bd. Nov. 2, 2010).

The Settling Parties do not believe that the Non-Settling Claimants could plausibly claim even 1% of the 2011 Sound Recordings Fund. Claims that are baseless and implausible are considered unreasonable. *See* Partial Distribution of 2008 DART Sound Recordings Fund, 2009-3 CRB DD 2008 (Copyright Royalty Bd. Aug. 19, 2009) (Order rejecting an objection to a request for partial distribution because the objection was baseless and "facially implausible"); *See also* Distribution of 2010 Digital Audio Recording Royalty Funds, Docket No. 2011-6 CRB DD 2010 (Copyright Royalty Bd. Mar. 6, 2012) (order denying Treasa Fennie's motion for 2% partial distribution of the 2010 DART

Sound Recordings Fund because of her "bald assertions"). Therefore, since there can be no reasonable objection to the 98% partial distribution of the 2011 Sound Recordings Fund, the partial distribution is warranted.

**III. The Settling Parties agree to return any excess royalty amounts plus interest to the extent necessary to comply with the CRB's final determination on the distribution of fees.**

As a condition to the partial distribution of the 2011 Sound Recordings Fund royalties, the Settling Parties hereby agree to be bound by the conditions uniformly imposed under § 801(b)(3)(C). Specifically, the Settling Parties agree that in the event that the final 2011 royalty percentages for the Settling Parties differ from the partial distributions hereby requested, any claimant who has received more than its share will "return any excess amounts to the extent necessary to comply with the final determination on the distribution of fees" plus interest. *See* 17 U.S.C. § 801(b)(3)(C)(ii); *see also* Distribution of 2010 Digital Audio Recording Royalty Funds, Docket No. 2011-6 CRB DD 2010 (Copyright Royalty Bd. Nov. 17, 2011); Distribution of 2005-2008 DART Musical Works Funds Royalties, Docket No. 2010-8 CRB DD 2005-2008 (MW) (Copyright Royalty Bd. Apr. 14, 2011). The Settling Parties agree to sign and file such an agreement as prepared by the Copyright Royalty Judges pursuant to §801(b)(3)(C)(ii)(iii).

By agreeing to this condition, the Settling Parties ensure that the Non-Settling Claimants are protected from any risk that might result from the partial distribution, while also ensuring that the Settling Parties, who represent the vast majority of entitled recipients, receive the royalties to which they are entitled in a timely fashion.

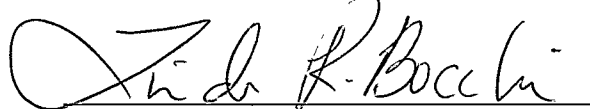
As to the amounts to be distributed to each Settling Party, we move to have the distribution made in bulk to AARC as a common agent for all Settling Parties. Agreements as to the proportionate allocation of royalties and the designation of a common agent to receive payment on behalf of the Settling Parties are permitted by the AHRA. 17 U.S.C. § 1007(a)(2)(2006).

#### IV. Conclusion

In view of the foregoing, the Settling Parties believe that there can be no reasonable objection to the partial distribution of 98% of the 2011 Sound Recordings Fund to the Settling Parties.

WHEREFORE, the Settling Parties respectfully request that, pursuant to § 801(b)(3)(C), the CRB make a prompt partial distribution of 98% of the 2011 Sound Recordings Fund to AARC, as agent for the Settling Parties.

Respectfully submitted,  
On Behalf of the Settling Parties

A handwritten signature in black ink, appearing to read "Linda R. Bocchi", written over a horizontal line.

Linda R. Bocchi, Esq.  
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July 11, 2012



## EXHIBIT A

### DECLARATION OF RICHARD SELTZER

I, Richard Seltzer, declare under penalty of perjury as follows:

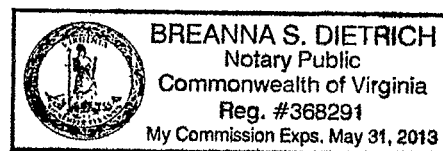
1. My name is Richard Seltzer, and I am a Political Science professor at Howard University, where I currently teach graduate courses in statistics and research methods. For the past thirty-two years, I have also designed and conducted various surveys. Additionally, I have authored numerous publications, which are listed in the attached curriculum vitae. On account of my experience in the field, I have previously been qualified as an expert in statistics and survey research in several federal and state courts. In addition to my teaching responsibilities, I have acted as a consultant to a variety of organizations in creating and maintaining complex databases. For the last fifteen years, I have worked with the Alliance of Artists and Recording Companies ("AARC") as a royalty distribution system and sales data consultant. It is through this professional relationship that I have become familiar with Nielsen SoundScan's sales data,<sup>1</sup> the data my following testimony is based upon.
2. I confirm that AARC's Royalty Distribution System uses SoundScan data to determine the annual allocation of the DART Sound Recordings Fund royalties among claimants before the Copyright Royalty Board.
3. I have reviewed the 2011 SoundScan record sales data in the AARC Royalty Distribution System and found 2,384 record sales for Herman Kelly aka Herman Kelly And Life, Herman Kelley, H. Kelly, and Afterschool Publishing Company, and 133 record sales for Treasa Fennie aka Write 4 U as featured recording artists.
4. I have reviewed the 2011 SoundScan record sales data in the AARC Royalty Distribution System and found no record sales for Eric N. Burns and Pramod Kesav Narayana Pillai, and 2,384 record sales for Herman Kelly aka Herman Kelly And Life, Herman Kelley, H. Kelly, and Afterschool Publishing Company, 133 record sales for Treasa Fennie aka Write 4 U and 14 record sales for Marc Alan Suaton as copyright owners.
5. The 2011 universe of record sales for claimants to the 2011 Featured Recording Artists Subfund, which includes record sales of the Settling Parties as defined in AARC's "Notice of Settlement and Request for Partial Distribution of the 2011 DART Sound Recordings Fund Featured Recording Artists and Copyright Owners Subfunds Royalties," and the 2,384 record sales for Herman Kelly aka Herman Kelly And Life, Herman Kelley, H. Kelly, and Afterschool Publishing Company and 133 record sales for Treasa Fennie aka Write 4 U is 1,150,306,223 record sales.

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<sup>1</sup> "Nielsen provides charts and insights for both music broadcast and sales. We capture in excess of 100 million song performances on more than 2,000 radio, satellite radio, network radio, and music video channels across Canada, Mexico, Puerto Rico and the United States. Nielsen's tracking of music sales data is used by all major and most independent record companies as well as distribution companies, artist managers, booking agents, concert promoters, performing rights organizations, government agencies, venue owners, traditional retailers, online retailers, and digital delivery companies. Nielsen's data on airplay and sales is featured weekly in *Billboard* magazine and is widely cited by numerous publications and broadcasters as the standard for music industry measurement." See: <http://www.nielsen.com/us/en/industries/media-entertainment/music.html>

6. The 2011 universe of record sales for claimants to the 2011 Copyright Owners Subfund, which includes record sales of the Settling Parties as defined in AARC's "Notice of Settlement and Request for Partial Distribution of the 2011 DART Sound Recordings Fund Featured Recording Artists and Copyright Owners Subfunds Royalties," and the 2,384 record sales for Herman Kelly aka Herman Kelly And Life, Herman Kelley, H. Kelly, and Afterschool Publishing Company, 133 record sales for Treasa Fennie aka Write 4 U and 14 record sales for Marc Alan Suaton, and no record sales for Eric N. Burns or Pramod Kesav Narayana Pillai, is 1,261,449,205 record sales.

I declare under penalty of perjury that the foregoing is true and correct.



  
\_\_\_\_\_  
Richard Seltzer

7/10/12  
\_\_\_\_\_  
Date

City of Alexandria

Commonwealth of Virginia

Certified this 10 day of 7, 2012



\_\_\_\_\_  
Notary Public

My commission expires: May 31, 2013

## CURRICULUM VITAE

### RICHARD A. SELTZER

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Rank: Professor

### II. EDUCATION

Undergraduate: University of Denver

Ph.D.: Graduate School of International Studies  
University of Denver, August, 1978

### III. ACADEMIC FIELDS OF INTEREST

- a. Methodology: including public opinion surveys and statistical analysis.
- b. Legal Studies: including juror decision making processes and jury composition.

### IV. BOOKS

Seltzer, R. and Holona LeAnne Ochs (2010). *Getting a Cut: A Contextual Understanding of Commission Systems*, Lanham: Lexington Books.

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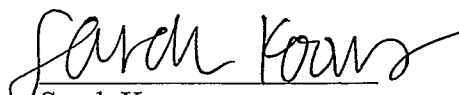
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**CERTIFICATE OF SERVICE**

I, Sarah Koons, Junior Royalty Administrator of the Alliance of Artists and Recording Companies, certify that on this July 11, 2012, a copy of the foregoing "Notice of Settlement and Request for Partial Distribution of the 2011 DART Sound Recordings Fund Featured Recording Artists and Copyright Owners Subfunds Royalties" was served, by the designated delivery method, on the following parties:

  
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<sup>1</sup> No postal carrier is able to guarantee overnight delivery service to France. We have therefore sent this pleading to Mr. Suaton electronically via email and by USPS Flat Rate Express Mail, which will arrive in an estimated 3-5 business days.

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